



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

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ATTORNEY GENERAL

State Board of Education of Texas  
Austin, Texas

Gentlemen:

Opinion Number C-5477  
Re: Renewal of textbook  
contracts.

We have received letters from two different members of your board requesting the opinion of this department on several questions relating to the above captioned subject. The letter dated July 23, 1943, reads in part as follows:

"At the next meeting of the State Board of Education to be held in Austin on August 2, the matter of issuing formal proclamation for the purchase of text books under Article 2346 is to be considered.

"There seems to be a divided opinion among some of the members of the Board (practically all of them are new members) as to whether or not at this next meeting the Board can proceed to enter into agreements if it so desires with some of the publishing companies holding contracts upon which books are expiring this year, to renew such contracts for the statutory periods under Article 2342 Revised Civil Statutes.

"Therefore, I should like for you to advise, on or before August 2, 1943, whether or not the Board can enter into such agreements, without first issuing the proclamation for such books

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under said Article 2846, and whether such renewal or extended contracts can be made prior to the second Monday in October.

"Your attention is directed to the last clause of the second 'proviso' of Article 2842, which reads as follows: 'And it shall always be lawful for them (the board) to renew a contract on such terms as in their judgment may be for the best interests of the state.'

"It is contended by some that due to high costs of material, labor, etc., that the books under a contract made now will naturally be bid at a higher price than those books now in adoption, and which may be bought under an extended or renewed contract. While, on the other hand, it is likewise contended that a contract should not be renewed or extended without first examining all of the books that competition may offer and the prices asked for such books, otherwise how can one say that the book in adoption is best or that the economies involve more thrift, and selecting the best books at the best prices necessarily includes knowledge of all the books which may be offered in each category and the respective price at which each may be purchased.

"Again, we are confronted with this situation: The Board has recently been advised by a publisher holding a contract on certain books going out of adoption this year, that it will gladly renew its present contract at the same prices, but if it should have to submit bids under a new proclamation, it will not do so. This may be the same situation with other publishers.

"Therefore, can the Board, through the exercise of its judgment, consideration and discretion, as given it under Article 2842, enter into such renewals or extensions (without issuing the proclamation) and prior to the second Monday in October?"

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The letter dated July 26, 1943, is quoted in part as follows:

"To guide and assist us in our deliberations on August 2nd, 1943, I respectfully urge your written answers to the inquiries herein-after made.

"Article 2846, as amended by the Acts of 1927, 40th Legislature, Page 308, Chapter 213, Section 4, specifically requires the Chairman of the State Board of Education to give public notice two months in advance of the meeting, as required therein, when texts are to be selected and adopted, or where a contract for a text then in use is about to expire.

"Article 2847, Acts of 1927, 40th Legislature, Page 308, Chapter 213, Section 5, relates to all bids submitted for furnishing of textbooks and fixes the eligibility of each bidder.

"Article 2848, Acts of 1927, 40th Legislature, Page 308, Chapter 213, Section 5, relates to continuing or discontinuing textbooks.

"Article 2851, Revised Civil Statutes of Texas, relates to contractors' bonds.

"The renewal of an existing contract with a publisher, or the continuance of the contract, whether at the same or a different price, constitutes, per se, a new agreement, if not as to

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terms, at least to the extent that the parties' minds must meet in accord to allow the old agreement to remain in effect for a given time.

- "1. Does the State Board of Education, in your opinion, have the legal authority to make a renewal or extension agreement with a text in use that is about to expire at any meeting where notice has not been given as required by the terms of Article 2846 above referred to?
- "2. Does the State Board of Education, in your opinion, have the legal authority to renew or extend a contract with a publisher for a text in use that is about to expire when such publisher has failed to file a bid or has failed to comply with the provisions showing eligibility as set forth in Article 2847 above mentioned?
- "3. When a contract for a text in use and about to expire has been legally renewed or extended, does the State Board of Education, in your opinion, have the legal authority to dispense, for the extended or renewed term of the agreement, with the contractor's bond prescribed by the terms of said Article 2851?

"Since the purchasing of textbooks under the free textbooks laws of this State is no less a purchase under an extension or continuance of a preexisting contract than under a new adoption, it would seem consistent with the spirit of our laws and the legislative intent to require the same openness, eligibilities and securities with reference to one as to the other."

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The questions asked involve an instance of original statutory construction, for as far as we can determine, there have been no cases or opinions which in anyway directly answer such questions.

Article 2342 reads in part as follows:

"It shall be the duty of the Commission to meet annually on the second Monday in October, and at such other times as it may be called together by the Chairman, for the purpose of considering the advisability of continuing or discontinuing, at the expiration of each current contract, any or all of the State adopted textbooks in use in the public schools of Texas, and of making such adoptions as are provided for in Section 5 of this Act. Before making any change in the adopted series, however, the Commission shall, upon thorough investigation, satisfy itself that a change is necessary for the best interests of the school children and that such change is consistent with financial economy. Provided that unless new texts better suited to the Commission are offered to supplant existing texts, then the Commission shall renew the existing contracts for such a period as may be deemed advisable not to exceed a period of six years. Provided, that whenever the contractor supplying any book agrees to renew the contract on the same terms for a period of not less than two years or more than six, the members of the Commission shall give preference to the offer of the Company holding the contract if they shall thereby secure as good or better books at a lower price than by making a different contract; and it shall always be lawful for them to renew a contract on such terms as in their judgment may be for the best interests of the State. Provided further that before the Commission shall determine to displace any book upon which the contract

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is expiring, it shall, before making a new contract for a new text, ascertain through the office of the State Superintendent of Public Instruction, the number of usable books of the kind on which the contract has, or is about to expire, there are on hand, and also the estimated number of such books that would be required to supply the needs of the schools of the State using said books for the first, second and third years immediately succeeding the expiration of the contract on such books. The Commission shall then secure from the publisher of such book a bid or offer for the furnishing of such textbooks to meet the actual necessities of the schools of the State during the said first, second, and or third year period, allowing the State, however, a margin of twenty-five per cent over, or twenty-five per cent under, the estimated number to be required. If, upon consideration of the cost of the books required to supply such needs for such a period, it appears to the Commission that it will be economical to do so, it may make a contract with such publisher to furnish such books during said first, second and, or third year period with a view to using up the entire supply of such books on hand instead of wasting the same at the expiration of the original contract. At the expiration of said period, the commission shall then make a contract for a textbook on the subject. No contract shall ever be made, binding the State to buy a specific number or a specific quantity of textbooks, but all contracts shall be for such books as the State may need and the purpose of furnishing an estimated number of the books needed, as above provided, shall have as its purpose to give the textbook publishers only an approximation as to the possible quantity of books which the State may need. \* \* \* At the time the Superintendent of Public Instruction undertakes to secure a statement of the number of usable

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books on hand, as provided above, he shall also secure from the superintendents of independent school districts and county superintendents an expression as to whether or not they believe the existing text should be re-adopted or a new text adopted, and such information shall be for the use of the Textbook Commission, but the Textbook Commission shall not be bound to re-adopt the old text or to adopt a new text by reason of such expression of preference by such superintendents. Acts 1927, 40th Leg., p. 308, ch. 213, sec. 3."

Article 2846 reads in part as follows:

"When texts are to be selected and adopted under the provisions of this law, or where a contract for a text then in use is about to expire, the Chairman of the Commission shall, two months in advance of the meeting of the Commission, at which time, the adoption may be made, give public notice by having printed in the public press a notice to the effect that such meeting will be held and that adoptions will be made, and by sending written notices to all persons, firms or corporations in whose behalf such notices shall have been requested. Such notices shall state the time and place of the meeting of the Commission, the subjects on which textbooks may be adopted, and the last date on which sample copies of books offered, prepared as provided in the succeeding paragraph of this Article shall be deposited, the amount of the cash deposit required, the time allowed for signing contract and filing bond after award is made; and that formal proposals will be received on the date of the meeting." (Emphasis supplied)

Provision is also made for the deposit of sample copies of books, the filing of bids, and the making of cash deposits.

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In Opinion No. O-3939 we said the following about Articles 2847, 2852, and 2853:

"Article 2847 provides for the filing of bids and also for the filing of an affidavit to be executed by the individual bidder or a member of the firm or the president and secretary of the corporation bidding. The affidavit shall contain various statements, among which are that no member of the Commission is in any way interested in such individual, firm or corporation bidding; the names of any and all persons who may have at any time during the preceding year received, either directly or indirectly, any money or other thing of value from said company for services rendered the State; the names of all the people employed to act for such bidder, directly or indirectly, in any way whatsoever in securing the contract or in the preparation of its bids, etc. The statements made in the affidavit are declared to be warranties, and 'if found to be untrue, shall subject the contract to forfeiture and authorize a recovery on the bond to the full amount thereof, as liquidated damages, unless it be shown that such mis-statement or non-disclosure of fact was unintentional or an oversight on the part of said publisher.'

"Provision is made that the maximum price for the books under the contract shall not exceed the minimum price at which the publisher sells the books in wholesale quantities, and that a contract providing for a higher price shall be void. (Article 2852) Provision is made that no books shall be purchased from anyone connected with a trust and that the bidder shall file an affidavit stating that he is not connected directly or indirectly with a trust. (Article 2853)."

Article 2851 provides that the "bidder to whom any contract may have been awarded shall execute a good and sufficient bond" in the amount and under the conditions specified therein.



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We now have before us various statutory provisions directly bearing upon the questions asked, and we think that the proper construction of such provisions impels the conclusion that a renewal of a contract must be made in the same manner as the making of an original contract, and notice must be given in accordance with Article 2846.

Referring back to Article 2842, you will note that it is the duty of the Board of Education (Article 2675b-5) to meet annually on the second Monday in October " \* \* \* for the purpose of considering the advisability of continuing or discontinuing, at the expiration of each current contract, any or all of the State adopted textbooks in use in the public schools of Texas, and of making such adoptions as are provided for in Section 5 of this Act." Thus, it is seen that it is the express duty of the Board of Education to meet in October to determine whether any textbook, at the expiration of the contract covering the book, should be continued in use. The following clause appears:

"Provided, that wherever the contractor supplying any book agrees to renew the contract on the same terms for a period of not less than two years or more than six, the members of the Commission shall give preference to the offer of the Company holding the contract if they shall thereby secure as good or better books at a lower price than by making a different contract; and it shall always be lawful for them to renew a contract on such terms as in their judgment may be for the best interests of the State." (Emphasis supplied)

The first clause manifestly contemplates that more than one bid or offer may be made, and it provides that preference shall be given the company holding the contract under the conditions outlined therein. It has been urged that the second clause affords the legal basis for renewing a contract without going through the steps required by Article 2746, but we do not think that this was the intent of the Legislature in enacting said second clause.

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The first clause provides that preference shall be given the holder of a contract if as good or better books at a lower price under a renewed contract may be obtained. However, suppose the books are as good but the unit price is higher than that bid of another publisher. The State may have on hand many books, covered by the expiring contract, in usable condition; therefore, the Board may decide that it would be more economical to supplement these books than to make a change. Under the second clause above quoted, we think that the Board may accept the bid of the contractor and renew the contract.

This conclusion is consistent with the general purpose of the textbook law. Provision is made for competitive bidding, the deposit of sample books, and an examination of the books by the Board of Education. The Legislature provided certain safeguards and restrictions in the adoption of books and letting of contracts. As we said in Opinion No. O-3939, "These safeguards were put in the statutes for the benefit of the State of Texas and its citizens, to secure for school children the best books at a fair price, to assure the people that they would get full value for their tax money, and to eliminate the possibility of fraud and deception."

By simply renewing a contract without following the statutory steps, the purposes of the law, with respect to bidding and a study of the books offered so that the best would be selected, could be entirely averted. How can the Board know without an examination of books that better texts offering more effective means of instruction are not offered, or that other books will not be more economical to adopt? It was not the intent of the Legislature to allow a circumvention of the purposes of the Act and an aversion of the statutory safeguards, for conditions both as to bidders and books could have entirely changed since the original contract was made.

Moreover, you will note that Article 2846 provides that the notice shall be given when texts are to be selected or adopted, "or where a contract for a text then in use is about to expire." This is a further indication that renewals are to be made like any other adoption.

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In the July 23rd letter it is asked whether the Board may enter into extensions or renewals without issuing notice and prior to the second Monday in October. It is our opinion that the notice is required. The Board must meet on the second Monday in October, but it may also meet at other times. We assume that the question asked has reference to the current year. Therefore, a notice of two months from August 2nd would continue into October. Hence, we answer this question in the negative. We also answer the three questions asked in the July 26th letter in the negative.

APPROVED JUL 31, 1943

*Tom Miller*  
FIRST ASSISTANT  
ATTORNEY GENERAL

OVS-s

*op*  
*C.C.R.*

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

*George H. Sparks*  
George H. Sparks  
Assistant

APPROVED  
OPINION  
COMMITTEE  
BY *BLW*  
CHAIRMAN